114-598

SUPREME COURT U. S.
FILED
APR 6 1885
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the U. S.

OCTOBER TERM, 1884.

No. 253.

ARTHUR GEORGE BROWN, ADMINISTRATOR D. B. N. C. T. A. OF CHARLES MACALESTER, DECEASED, APPELLANT.

vs.

STATE OF MARYLAND AND OTHERS, APPELLEES.

BRIEF ON THE PART OF THE STATE OF MARYLAND, APPELLEE.

CHAS. B. ROBERTS,
Attorney General of Maryland.

CHAS. J. M. GWINN,
Of Counsel for the State of Maryland, Appellee.

JOHN MURPHY & CO., PRINTERS, BALTIMORE.

IN THE

Supreme Court of the United States,

October Term, 1884.

No. 253.

ARTHUR GEORGE BROWN, ADMINISTRATOR D. B. N. C. T. A. OF CHARLES MACALESTER, DECEASED, APPELLANT.

vs.

STATE OF MARYLAND AND OTHERS, APPELLEES.

BRIEF ON THE PART OF THE STATE OF MARYLAND, APPELLEE.

One of the Bills included in this record was filed by the State of Maryland, now appellee, against the appellant in the Circuit Court of the United States for the District of Maryland. Record, p. 1.

The other Bill included in this record was filed by William W. Corcoran and others, now appellees, against the appellant in the same Court. Record, p. 101.

There were of course separate proceedings and pleadings in each case; the appellant demurring to each Bill. Record, pp. 99, 112.

The demurrers were argued together, but separate decrees were rendered upon such separate demurrers on *June* 22, 1882. Record, pp. 100, 113.

On *June* 30, 1882, *after the entry of such respective decrees*, the appellant prayed the Circuit Court to consolidate the two causes, asking that the order might be passed *nunc pro tunc*, and might have the same effect as if such order had been passed before June 22, 1882, the date of the respective final decrees in the said several causes. Record, p. 114. The Court passed such order. Record, pp. 114, 115.

Sec. 921 of the Revised Statutes, U.S., permits the consolidation of "causes of a like nature, or relative to the same question, *pending* before a Court of the United States, or of any Territory."

A final decree had been entered in each of the cases referred to on June 22d, 1882. A case is not *pending* in any Court, when final judgment or decree has been rendered by the Court in such case. *Holland vs. Fox*, 3 Ellis & Black, 985, 77 E. C. L. Rep. 985. See cases referred to in Lawson's Concordance, word "Pending," p. 261.

It would not seem that the Circuit Court had power to consolidate the two cases embraced in this Record, after a decree had been entered in each; and such order of consolidation, Record, p. 114, and the appeal thereon, Record, p. 115, being irregular, it would appear that such appeal cannot be properly entertained.

As the Bill of the State of Maryland, now appellee, was demurred to, Record, p. 99, the facts set forth in that Bill are admitted to be true.

Sullivan vs. Iron Silver Mining Co., 109 U. S., 555.

It appears by the Bill of complaint in this case, Record, p. 11, and by the docket entries made a part thereof, Record, p. 97, that Charles Macalester brought suit in the Circuit Court of the United States for the District of Maryland, against the Chesapeake and Ohio Canal Company on November 5th, 1853.

On November 24th, 1854, he obtained a judgment by default in that Court against the defendant company, Record, p. 97, and his damages were assessed at $5,471,37.

The defendant company has remained in existence from the date of such judgment until now, transacting the business in which its charter required it to engage.

No execution, or attachment was issued upon this judgment. Record, p. 97.

The judgment thus obtained was revived by a *sci. fa.*, issued to November Term, 1866, of the said United States Circuit Court. On April 4th, 1867, a *fiat* was entered.

The judgment, in this new form, lay absolutely dormant until April 1st, 1879, when the plaintiff's death was suggested,—the present appellant, as administrator, *de bonis non cum testamento annexo*, made a party to the cause,—and a *sci. fa. on sci. fa.*, issued to April Term, 1879.

On October 9th, 1880, a judgment of *fiat executio* was entered for the plaintiff, now appellant; and, on October 23d, 1880, the appellant issued an attachment on this judgment. Record, p. 98.

The attachment issued on October 23d, 1880, after so long a period of inaction, was laid upon money belonging to the Chesapeake and Ohio Canal Company, *made up exclusively of the tolls*

and revenues of said company, received by it in the course of its corporate business, and deposited by it in the Farmers and Merchants National Bank of Baltimore, and remaining in the possession of that bank. Bill, Record, p. 12, par. 32.

The action taken by the appellant compelled the filing, by the State of Maryland, in the same Court, of the Bill set out in pages 1–12 of the Record, to restrain the appellant against taking any other or further proceedings in the said Circuit Court of the United States for the District of Maryland under said attachment.

The State of Maryland had a right to become a complainant in that Court, in the proceeding which it adopted, because that proceeding was not an original suit, but was in its nature wholly ancillary and supplementary to the suit instituted by the appellant's testator in that Court, the judgment in which had been revived by the appellant. *Dunn vs. Clarke*, 8 Peters, 3; *St. Luke's Hospital vs. Bailey*, 3 Blatchf., 259–264; *Gue vs. Canal Co.*, 24 Howard, 262–264; *Freeman vs. Howe*, 24 Howard, 460.

The Bill of the State of Maryland, Record, p. 4, sets forth the following facts:

The Chesapeake and Ohio Canal Company was incorporated by an Act of the General Assembly of Virginia, passed on January 27th, 1824. This Act was accepted, assented to and confirmed by the Maryland Act of 1824, chap. 79. For Act, see Record, p. 14. These respective Acts of Maryland and Virginia were confirmed by an Act of Congress of the United States, approved on March 3rd, 1825.

See Bill, Record, pp. 1, 2, 4 U. S. Stat., Appendix 792–803, 805.

The said Chesapeake and Ohio Canal Company constructed, under the powers conferred by these respective Acts, a Canal, extending from Georgetown, in the District of Columbia, to Cumberland, in Maryland. Bill, Record, p. 2.

The State of Maryland loaned to the Chesapeake and Ohio Canal Company, under the Maryland Act of 1834, chap. 241, $2,000,000 to be used in the construction of the canal of the said Company. Bill, Record, p. 2. For Act, see State's Exhibit 2, Record, p. 49.

The said Chesapeake and Ohio Canal Company, to secure the payment of the said loan, and the interest thereon, and the fulfilment of the conditions on which the same was made, mortgaged to the State on April 23rd, 1835, all and singular its lands and tenements, capital stock, estates and securities, goods and chattels, property and rights, then, or at any time thereafter, to be acquired, and its net tolls and revenues. For Act, see Bill, Record, p. 2, State's Exhibit, No. 3, Record, p. 86.

That loan and the interest which has accrued thereon, remain wholly unpaid. Bill, Record, p. 3.

The State of Maryland afterwards, under the Maryland Act of 1835, chap. 395, subscribed and paid for thirty thousand shares of the capital stock of the said Chesapeake and Ohio Canal Company, bearing a preferential dividend in the nature of interest. Bill, Record, p. 3. For Act, see State's Exhibit, No. 4, Record, p. 43.

Under the requirements of the seventh section of the Maryland Act, last referred to, the Chesapeake and Ohio Canal Company, before the State of Maryland made the said subscription of thirty thousand shares to the capital stock of the said Chesapeake and Ohio Canal Company, stipulated and agreed on September 26th,

1836, by an instrument in writing, signed by its president, and under its corporate seal, to guarantee to the State of Maryland the payment, out of the profits of the work, of six per centum per annum, payable semi-annually, on the whole amount of money, which should be paid by the said State to the said Canal Company under the said Act, until the clear annual profits of the said Canal should be more than sufficient to discharge the sums of money, which the said Canal Company should be liable to pay annually to the said State of Maryland, and should be adequate to a dividend of six per centum among its stockholders, except the holders of stock subscribed in virtue of the stock and debt of a certain Potomac Company; and that, thereafter, the State of Maryland should, in reference to the stock subscribed on its behalf, be entitled to have and receive a proportional dividend upon the profits of the work, as declared from time to time, and no more. Bill, Record, p. 3. For Obligation, see Record, p. 56.

The Chesapeake and Ohio Canal Company, has never paid to the said State of Maryland any part of the preferential dividends, or interest, thus stipulated to be paid, but remains indebted therefor. Bill, Record, p. 3.

The obligation, thus executed on September 26th, 1836, made the preferential dividends, agreed to be paid on the stock in the Chesapeake and Ohio Canal Company, so subscribed and paid for by the State of Maryland, *charges and liens, in favor of said State, upon all the franchises and gross revenues of the said Chesapeake and Ohio Canal Company from the date of the respective payments made by said State of Maryland, for the stock of said company.* Bill, Record, pp. 3, 4.

State vs. Balto. & Ohio R. R. Co., 6 Gill, 383.

The State of Maryland afterwards, under the Maryland Act of 1838, chap. 396, subscribed for an additional number of 13,750

shares of the capital stock of the said Chesapeake and Ohio Canal Company, bearing a preferential dividend in the nature of interest. Bill, Record, p. 4. For Act, see Record, p. 58.

The said stock, thus subscribed, was fully paid for. Bill, Record, p. 4.

The said Chesapeake and Ohio Canal Company, before the subscription last refered to was made, accepted the provisions of the Act of 1838, chap. 396, and stipulated and agreed, under its corporate seal, to guarantee after three years from the date of the bonds authorized by said Act to be issued by the said State for the purpose therein directed, the payment to the said State of Maryland of six per centum per annum, semi-annually, out of the profits of the said work, on the whole amount of money paid to the Canal Company under said Act, until the clear profits of the said Canal Company should be more than sufficient to discharge the sums of money which it should be liable to pay annually to the State of Maryland, and should be adequate to a dividend of six per centum per annum among its stockholders, except the holders of stock subscribed in virtue of the stock and debt of the Potomac Company; and that thereafter the State should, in reference to the stock, so subscribed for on its behalf, be entitled to have and receive a proportionable dividend upon the profits of the work, as declared from time to time, and no more. Bill, Record, p. 4.

This obligation, so executed, made all the preferential dividends, thus agreed to be paid on the stock of the said Chesapeake and Ohio Canal Company, so subscribed and paid for as last aforesaid by the State of Maryland, charges and liens in favor of the said State upon all the franchises and gross revenues of the said Chesapeake and Ohio Canal Company from the date of the respective payments made by the said State of Maryland for the said stock.

State vs. Balto. & Ohio R. R. Co., 6 Gill, 383.

The Chesapeake and Ohio Canal Company has never paid to the State of Maryland any part of the preferential dividends, or interest so by it stipulated to be paid to the State of Maryland, but remains indebted for the same to the State of Maryland. Bill, Record, p. 4.

The Chesapeake and Ohio Canal Company, afterwards, in pursuance of the requirements of the Maryland Act of 1838, chapter 496, on May 15th, 1839, by a mortgage duly recorded in the District of Columbia, and in the State of Maryland, mortgaged to the said State of Maryland all and singular its lands, tenements, estates and securities, goods and chattels, property and rights, then or at any time thereafter to be acquired, and the net tolls and revenues of the said Company, to secure the payment to the said State of Maryland, of the interest at the rate of five per centum on the stock of the State of Maryland, created under said Act of 1838, chapter 396, for the term of three years from the date of the bonds or certificates of said stock, issued under said Act of 1838, chapter 396, together with the cost of transmitting said interest to London, to be there paid, and also the difference in the exchange of currency between London and the City of Baltimore. Bill, Record, pp. 4, 5. For Mortgage, see Record, p. 64.

Notwithstanding all this aid, the Chesapeake and Ohio Canal Company found itself, in 1844, unable to complete its canal to Cumberland, in Maryland. It was found by that company, and by the State of Maryland, that it was necessary, in order to enable the Canal Company to raise the money needful for the completion and continued operation of its canal, to subordinate, by a new contract, the primary lien of the State upon the *revenues* of the canal to the lien of such moneys as might be advanced for the purpose of completing the said canal and keeping it "a living, going concern." This new contract was made by the Maryland Act of 1844, chap. 281. Bill, Record, p. 5. For Act, see Record, p. 66.

Under the Act of 1844, chap. 281, Record, pp. 5, 66, which was accepted by said Chesapeake and Ohio Canal Company, and which constitutes a contract, the President and Directors of that Company were authorized to issue bonds to an amount not exceeding one million seven hundred thousand dollars to provide means for completing the Chesapeake and Ohio Canal to Cumberland. Bill, Record, p. 13.

The Act provided that said bonds, subject to the qualifications and reservations provided for in the second section of the Act, should be preferred liens, without preference or priority over each other, *on the revenues and tolls* of the whole and every part of such canal between Georgetown, in the District of Columbia, and Cumberland, in the State of Maryland. Bill, Record, pp. 5, 6, 1844, chap. 281, sec. 1 and sec. 2, Record, p. 67.

No other property of the Chesapeake and Ohio Canal Company, except such revenues and tolls, was pledged for the security of these bonds.

The qualifications and reservations imposed by the contract upon the pledge of the revenues and tolls of the Canal Company were contained in the express provision, made in the second section of the Maryland Act of 1844, chap. 281, that *the President and Directors of the said Chesapeake and Ohio Canal Company should, from time to time, and at all times thereafter, have the privilege and authority to use and apply such portions of the gross revenues and tolls of said Canal Company as in their opinion might be necessary to put and keep the said canal in good condition and repair for transportation, provide the requisite supply of water, and pay the salaries of officers and agents, and the current expenses of the said Company.* Bill, Record, p. 6. For Act, see Record, p. 67.

It was provided, as a part of the said new contract or arrangement, that the rights and liens of the State of Maryland upon the

revenues of the said Chesapeake and Ohio Canal Company, should be held and considered as waived, deferred and postponed in favor of the bonds which might be issued under the preceding sections of the said Act, so as to make the said bonds, and the interest to accrue thereon, preferred and absolute liens on said revenues, *according to the provisions of the second section of said Act*, until the said bonds and interest should be fully paid. Bill, Record, p. 6. Act of 1844, chap. 281, sec. 4, Record, p. 68.

It was further provided, as a part of the said new contract or arrangement, by the sixth section of said Act, that the President and Directors of said Chesapeake and Ohio Canal Company might execute any deed, mortgage or other instrument of writing, which might thereafter be deemed necessary or expedient, to give the fullest effect to the preceding provisions of the said Act. Record, pp. 6, 69.

It was further provided, by the seventh section of the said last mentioned Act, that the said Chesapeake and Ohio Canal Company should execute a further mortgage to the State of Maryland of its said canal, lands, tolls and revenues, subject to the liens and pledges made, created or authorized by the aforegoing provisions of the said Act, as an additional security for the payment of the loan made by the State of Maryland to the said Chesapeake and Ohio Canal Company under the said Maryland Act of 1834, ch. 241, and of the interest then due and in arrear, and which might thereafter accrue thereon. Record, p. 6.

In pursuance of the stipulation contained in the seventh section of said Act, the Chesapeake and Ohio Canal Company executed to the State of Maryland, on January 8th, 1846, a mortgage of all and singular its lands and tenements which it then had or might acquire, and of its said canal and appurtenances, *tolls, revenues and property*, subject to the lien and pledges made and authorized by

the provisions of the said Act of 1844, chap. 281, as an additional security for the loan made to said Canal Company by the State of Maryland under the Maryland Act of 1834, chap. 241. Record, pp. 6, 7. State's Exhibit 9. Record, p. 71.

The Chesapeake and Ohio Canal Company, professing to act under the provisions of said Maryland Act of 1844, chap. 281, executed on June 5th, 1848, a deed of trust, by way of mortgage, subject to the provisions of the said Act, to certain trustees therein named, [who accepted the trust,] of the *revenues and tolls* of the entire and every part of the said Chesapeake and Ohio Canal and its works, between Georgetown, in the District of Columbia, and Cumberland, in Maryland, in fee and in mortgage, to secure, after the payment of the debt then existing, and which might thereafter be contracted and be in arrear, for repairs on the canal and officers' salaries, first, the payment of interest on said bonds semi-annually, and, afterwards, the payment of such other interest and sums as are specified in said mortgage. Record, p. 7. For mortgage, see Record, p. 77. State's Exhibit 10.

This mortgage, it will be seen, was a pledge of the *revenues and tolls* of the Canal Company and of these *only*.

This mortgage recited the power vested in the President and Directors of the Canal Company, by the Act of 1844, chap. 281, sec. 2, viz: that they should "from time to time and at all times, have the privilege and authority to use and apply, such portions of said revenues and tolls, as in their opinion may be necessary to put and keep the said Canal and its works in good condition and repair for transportation, provide the requisite supply of water, pay the salaries of officers and agents, and the current expenses of said company." It was made subject to that provision. Record, p. 77.

The mortgage contained the further provision that, so long as the Canal Company should comply with its agreement by paying all interest upon the bonds referred to in said mortgage, as the same became due, and by providing an adequate sinking fund for the final redemption of said bonds, according to the provisions of said Act of 1844, chap. 281, it should retain the management of its canal and of its works and collect and receive its revenues and tolls. But, if it failed to comply with these conditions, from any cau-e except a deficiency of revenue, arising from a failure of business without fault on the part of the said Company, *which fault was to be made to appear by the trustees under the said mortgage*, then such trustees might demand and receive possession of the said canal, and appropriate its tolls and revenues in the manner provided by the said mortgage. Record, pp. 79, 80.

The State of Maryland did not, by the Act of 1844, chap. 281, waive its lien upon the *corpus* of the canal and its works. It only subordinated its lien on the *gross* revenues of the canal to the lien on the *net* revenues of the canal which it had accorded to the holders of the bonds issued under the Act of 1844, chap. 281, and secured by the mortgage of June 5th, 1848.

Under the Act of 1844, chap. 281, and under the mortgage of June 5th, 1848, no property was, in fact, vested in the trustees named in that mortgage except a legal interest in such *net* revenues of the Canal Company as might remain after the payment by the Company, out of its gross revenues and tolls, of all such moneys as might, in the opinion of its President and Directors, be necessary to put and keep the canal in good condition and repair for transportation, provide the requisite supply of water, and pay the salaries of officers and agents and the current expenses of the said Company. The following cases may be properly cited in illustration of this part of the argument: *Morgan vs. Union Pacific R. R. Co.*, 11 Fed. Rep., 693; *May vs. Garrett*, 19 Md., 177; *Burnham*

vs. Bower, 111 U. S, 777; *Union Trust Co. vs. Souther*, 107 U. S., 594, 595; *Miltenberger vs. Logansport R. W. Co.*, 106 U. S., 286; *Fosdick vs. Schell*, 99 U. S. 235, 251; *Hall vs. Frost*, 99 U. S. 399; *Union Pacific R. R. Co. vs. U. S.*, 99 U. S. 420, 421; *U. S. vs. Kansas Pacific Railway Co.*, 99 U. S. 459; *Gilman vs. Illinois & Miss. Tel. Co.*, 91 U. S. 603.

Under the Act of 1844, chap. 281, and the mortgage of June 5th, 1848, two entirely distinct trusts were created.

Under the Act of 1844, chap. 281, the President and Directors of the Canal Company were charged with the trust of using and applying only so much of the revenues and tolls of the canal as were, in their opinion, necessary to put and keep the canal in good condition and to make it a "living going concern," and of applying the net revenues, remaining after such expenditures, to the payment of the interest on the bonds referred to in said Act.

Under said Act, and under the mortgage of June 5th, 1848, the trustees were simply depositories of the right to see to the application of the net revenues of such canal, except in the event of the failure of the Canal Company to pay the interest on the bonds referred to in said Act and mortgage. In such case, if the trustees under the mortgage were able to show that the failure to pay interest on such bonds was caused by a deficiency of revenue, arising from the fault of the Company, their estate would be enlarged, and they would have a right to enter into possession of the canal, receive its gross tolls and revenues and appropriate them in the manner in which the Canal Company had been required to appropriate them.

In a word, under the *contract* between the State of Maryland and the Canal Company, evidenced by the Act of 1844, chap. 281, and under the mortgage of June 5th, 1848, the Canal Company

was primarily the *trustee* for the custody and disposition of the entire revenues and tolls of the canal, exercising a trust which was only defeasible by the trustees under the mortgage of June 5th, 1848; and by them only in the event of their being able to show that the failure of the Canal Company to pay interest upon the bonds secured by that mortgage, was caused by a deficiency of revenue brought about by its fault.

The State of Maryland re-affirmed its lien on the corpus of the Canal and also its lien on the revenues of the Canal, except in so far as such lien on the revenues has been affected by the Act of 1844, chap. 281, and by the mortgage of June 5, 1848, by the seventh section of the Act of 1844, chap. 281, and by the mortgage made to it by the Canal Company on January 8th, 1846. Bill, Record, pp. 6, 7. State's Exhibit 9. Record, p. 71.

Although the State of Maryland did not waive, by the Maryland Act of 1844, chapter 281, its lien upon the corpus of the Chesapeake and Ohio Canal, nor in terms, do more than subordinate its lien on the *gross* revenues of the Canal to the lien on the *net* revenues of the Canal, which it had accorded to the holders of the bonds issued under the Act of 1844, chap. 281, the necessary *effect* of its new arrangement and contract was to estop it from pursuing its remedies, under any of its mortgages, against the corpus or revenues of the Canal, because of any default committed by the Canal Company in payment of interest on the bonds intended to be secured by the mortgage of June 5th, 1848. The effect of pursuing such remedies would have been to deprive the bondholders under the Act of 1844, chap. 281, and under the mortgage of June 5th, 1848, of the security intended to be afforded to them by the agreed future application of the net revenues of the Canal Company.

The State of Maryland, therefore, was not in default after the acceptance by the Canal Company of the Maryland Act of 1844, chap. 281, in not entering into possession of the Chesapeake and Ohio Canal and taking its revenues as they accrued.

The trustees, under the mortgage of June 5th, 1848, Record, p. 77, were not in default for failing to enter into possession of the canal and take possession of its gross revenues. They had no right to do so, because the very mortgage in which they were named as trustees declared that the President and Directors of the Canal Company should have the authority to use and apply such portions of the revenues and tolls of the Canal Company as, in their opinion, were necessary in the repair and working of the canal.

The averments in the Bill of Complaint of the State of Maryland, Record, pp. 10, 11, par. 30, show plainly and affirmatively that there has been no such default on the part of the Canal Company as would authorize the trustees under the mortgage of June 5th, 1848, to enter into possession of the canal and its revenues. The averment in the Bill of the trustees under the mortgage of June 5th, 1848, Record, pp. 108, 109, par. 22, is to the same effect.

There has been, therefore, no default, or laches, on the part either of the State of Maryland, or of the trustees under the mortgage of June 5th, 1848, in asserting their respective rights. The Canal Company has remained in the possession of its revenues under a *contract* entered into between it and the State of Maryland, evidenced by the terms of the Md. Act of 1844, chap. 281, and by the terms of the mortgage of June 5th, 1848.

It must be supposed that Macalester, now represented by the appellant, had notice of the conditions affecting the revenues of

the canal when his claim, whatever it was, first accrued; because he did not recover his original judgment until November 24th, 1854, nearly ten years after the passage of the Act of 1844, chap. 281, and more than six years after the execution of the mortgage of June 5th, 1848. Record, p. 97.

It is averred in the Bill of the State of Maryland, Record, p. 12, and in the Bill of the trustees, Record, p. 110, in substance, that the judgment obtained by the said Macalester was for a claim unsecured by any of the mortgages referred to as made to the State of Maryland or to the trustees under the mortgage of June 5th, 1848.

The Court of Appeals of Maryland, speaking in *Brady vs. State*, 26 Md., 308, of the effect of the Act of 1844, chap. 281, and of the mortgage of June 5th, 1848, said: "It is very clear from the language of the Act of Assembly of 1844, and the mortgage made in pursuance of it, that the State waived its priority only in favor of the liens created and authorized by that Act. In all other respects, and against all other creditors, the State expressly reserved its rights and priorities, and there is no doubt that one of the objects, if not the only object, of taking the new mortgage authorized by that Act," [referring to the mortgage of Jan. 8th, 1846, Record, p. 71] "was to re-assert and re-secure its prior rights and claims, and place them beyond all cavil and dispute. If other creditors could thus step in and grasp by legal process the tolls or revenues of the Company, or enforce executions upon its property and works, the plain design of that law would be frustrated. The work itself would not only be destroyed by the abstraction of the means for its preservation, repairs and operation, but the preferred creditors deprived of their chartered securities, and the State itself defeated in all its plans and munificence for making this work the great and important channel of trade which was designed by these Acts of Assembly, and the conveyances

made under them." * * * "It is sufficient here to say, that by the Acts of Assembly of 1834, chap. 241, and 1844, chap. 281, and the covenant and mortgage which followed, all the net tolls and revenues of the Canal Company were assigned by way of security to the State; and, as any other assignee, the State would have a right to interpose its claim against any subsequent attachment. The credits attached in this case, the appellant himself admits in his answer, and it is clearly shown elsewhere in the Record, represent in part the income and earnings of the said canal."

"It is very evident from the Acts of Assembly and the covenant and mortgage referred to, that the Canal Company was to remain in possession and management of the work, while the net revenues were to be appropriated to the State's use as a creditor. A portion of the tolls and revenues were to be used, by express stipulation, for the purpose of repairs and to meet current expenses, and these were as much to be protected as the net earnings; for the vitality of the canal, as a public and profitable improvement, depended upon their use, as well as the ultimate security of the State as creditor." * * * "The right of the State to see to the proper application of all the tolls and revenues of the Company to these legitimate objects and prevent their waste or diversion to any other purpose whatever, is not to be interfered with the application of the technical rules which govern the ordinary relation of mortgagor and mortgagee."

In the case of the *Commonwealth of Virginia vs. Chesapeake and Ohio Canal Co.*, 32 Md., 534, the Court of Appeals of Maryland, speaking of the Act of 1844, chap. 281, and following and affirming the case of *Brady vs. State*, 26 Md., last cited, said: "It is too plain to admit of doubt that by this Act the State waived her liens upon the tolls and revenues in favor of the application of so much thereof as might be necessary for repairs and other purposes men-

tioned in the proviso." * * * The Company was to "have power to use and apply its revenues in such way as to preserve the existence of the canal and keep it a living operative work capable of earning tolls and revenues, and subserving the great public purposes for which its charter was granted."

It would seem, therefore, to be perfectly clear, that by the operation and effect of the Act of 1844, chap. 281, the tolls and revenues of the Canal Company, before then mortgaged to the State of Maryland, were released from the lien of that mortgage, and were, both by law and contract, segregated to such extent as might be necessary "to put and keep the said canal and its works in good condition and repair for transportation, provide the requisite supply of water, pay the salaries of officers and agents, and the current expenses of the said Company," and were placed to this extent at the disposition of the President and Directors of the Canal Company, who were *trustees* for that purpose.

Carson & Vickery vs. Phelps, 40 Md., 99.

The tolls and revenues thus segregated, were, to the extent to which it was necessary that they should be applied to the particular uses named, ear-marked, segregated and appropriated by the Act of 1844, chap. 281, considered both as a law, and, by its acceptance, as a contract.

No attachment or execution could affect any part of the tolls and revenues of the canal, or any of its property, bound by the trust thus created by the Act of 1844, *chap.* 281. *Poe vs. St. Mary's College*, 4 Gill, 502-504; *Balto. & Ohio R. R. Co. vs. Wheeler*, 18 Md., 379, 380. Such fund, or property, remained bound by the trust, notwithstanding such attachment or execution.

1 Perry on Trusts, 3rd Ed., Sec. 82.

Carson & Vickery vs. Phelps, 40 Md., 99.

All persons were affected with notice of the Act of 1844, chap. 281, and with notice of the lien upon the net revenue of the Canal Company appertaining to the bonds issued under that Act. *Ketchum vs. St. Louis*, 101 U. S., 315, 316; and also with notice of all the other Acts relating to the Canal Company to which reference has been made. In Maryland, such Acts are regarded as public laws.

Bosley vs. Susquehanna Canal Co., 3 Bland., 65.
Brady vs. State, 26 Md., 311.
Unity vs. Burrage, 103 U. S., 454–456.

All persons were also, under the laws of Maryland, affected with notice of the mortgages to which I have referred, and of all their various provisions, in so far as they affected either the Canal Company, or its real or personal estate.

Williams vs. Banks, 11 Md., 250.
Hudson vs. Warner, 2 H. & G., 430.
Cook's Lessee vs. Kell, 13 *Md.*, 493.

Under the third section of the Virginia Act of January 27th, 1824, re-enacted by the General Assembly of Maryland, incorporating the Chesapeake and Ohio Canal Company, that Company is managed by a President and six Directors. The State of Maryland has been, since the year 1843, the holder of the majority of the shares of stock of the said Chesapeake and Ohio Canal Company. It is entitled to elect, because of such ownership, the President and Directors who conduct the undertaking, and manage the Company's business. Under Article 12, sec. 2, of the Constitution of the State of Maryland, adopted in 1867, the Governor, Comptroller of the Treasury, and Treasurer of Maryland, being the Board of Public Works in Maryland, have a right to appoint the President and Directors of said Canal Company annually, because of the ownership by that State of a majority of

the stock of the said Canal Company. By the second section of the Maryland Act of 1844, chap. 281, it was expressly provided that the President and Directors of said Canal Company should, at all times thereafter, have the right to make the particular application of the tolls and revenues of said Canal Company, which is in said section provided for. The said Board of Public Works are moreover authorized, on behalf of the State, to exercise, by their personal presence at stockholders' meetings of the Chesapeake and Ohio Canal Company, and by their power of electing the President and Directors of said Company, and by their authority to require such Directors to prevent the establishment of tolls, which shall discriminate against the interest of the citizens, or products of this State, Const. 1867, Art. 12, sec. 1, a supervision and control over the management of the said Canal Company. That power of supervision and control is essential to the well-being of the said State, and it was the intent of the Maryland Act of 1844, chap. 281, to preserve this power in its entirety to the said State. Bill, Record, p. 8.

The entire capital stock of the Chesapeake and Ohio Canal Company is $8,226,593, of which the State of Maryland holds and owns $5,000,000 represented by 10,008 votes, out of a total of 19,737 votes. The State of Maryland, is a creditor of the said Chesapeake and Ohio Canal Company for unpaid preferential dividends upon the preferred stock owned by the State, in said Company; and for other moneys due and unpaid to it, secured by the mortgages made to it by said Chesapeake and Ohio Canal Company, to an amount exceeding ten millions of dollars. For all of this indebtedness it has a lien upon the tolls and revenues of said Canal Company. Bill, Record, pp. 8, 9.

The reservation by the State of Maryland of a delegated and irrevocable trust to the said Canal Company,—in which Company it held a major part of the whole stock, and over which Company

it exercised complete control, because of such ownership,—to use and apply, at all times, such portion of its revenues and tolls, as might be necessary to keep its Canal in navigable condition and properly worked, was essential to the certain and permanent value, and even to the existence of the Canal, in which the State of Maryland had invested so large a sum of money as stockholder and creditor. It was moreover an essential consideration of the agreement of waiver of its liens on the revenues of the said Canal, which was partially made by the said State by the Act of 1844, chap. 281. It was essential to the interest of the State, and necessary, from the very nature of the case, that the Canal Company, which was charged with the duty of operating the Canal, should have the right and power to receive its own revenues, and to apply them, primarily, to the maintenance of the Canal, to the end that the said Canal might be maintained in condition to fulfil its proper corporate purposes, and ultimately, to fulfil all its corporate obligations to the State, and to all its creditors. Bill, Record, p. 9.

Charles Macalester, in his life-time, and his personal representatives, since his death, and the appellant, administrator *de bonis non, cum testamento annexo,* of the said Charles Macalester, had each notice, before acquiring any of their respective rights of action in the premises, of all the liens, charges and duties affecting the revenues, tolls and property of the said Chesapeake and Ohio Canal Company which had been declared by statute. Each was especially affected with knowledge that such portions of the revenues and tolls of said Chesapeake and Ohio Canal Company, as were necessary to put and keep the canal of the said Company in good condition and repair for transportation, provide the requisite supply of water, and pay the salaries of officers and agents of the said Company, were dedicated and set apart to such purposes by the Act of 1844, chap. 281, which became, when it was accepted an amendment to the charter of the Canal Company, and a contract with the State of Maryland. Record, p. 9.

Brady vs. State, 26 Md., 311.
Green vs. Early & Townsend, 39 Md., 227, 231, 232.
Boyd vs. Parker & Co., 43 Md., 200.
Hudson vs. Warner, 2 H. & J., 415.

The appellant cannot now question the equitable right possessed by the State.

Frostburg Perpet. Build. Asso. vs. Hamill, 55 Md., 318, 319.

The mortgages made to the State, and the mortgage of June 5th, 1848, in so far these mortgages related to the tolls and revenues of the Canal Company were enforceable in Equity.

Butler vs. Rahn, 46 Md., 548.
Johnson vs. Canby, 29 Md., 216, 220.
State vs. N. C. R. W. Co., 18 Md., 218.

The judgment of the Defendant must be postponed in effect and operation to all these mortgages.

Dyson vs. Simmons, 48 Md., 215–218.

The said Chesapeake and Ohio Canal Company, by virtue of a power to it reserved by the second section of the Act of the General Assembly of Maryland of 1844, chap. 281, Record, p. 67, already referred to, and of the Maryland Act of 1878, chap. 58, which was intended to make the provisions of said Act of 1844, chap. 281, more effectual, executed on May 15, 1878, to James Sloan, Junior, Lloyd Lowndes, Junior, and George S. Brown, as Trustees, a mortgage of all and singular the tolls, revenues and other property, land, water rights and franchises, of the said Chesapeake and Ohio Canal Company, in trust to secure the payment of the principal and interest of certain repair bonds referred to in said mortgage, and in said Act of 1878, chap. 58. Record, pp. 9, 10. State's Exhibit, 11, Record, p. 86. For extracts from Act, see Appendix to this Brief.

Under said last mentioned mortgage, and under the provisions of said Maryland Act of 1878, chap. 58, the bonds, issued under the authority of the said last mentioned Act, have priority as liens upon the property, revenues and tolls, of the said Chesapeake and Ohio Canal Company over all the rights and liens of the State of Maryland, and over bonds, issued by the Chesapeake and Ohio Canal Company under the provisions of the Maryland Act of 1844, chap. 281, or subsequently issued under the provisions of the said Maryland Act of 1878, chap. 58. Bonds to a considerable amount have been issued by said Chesapeake and Ohio Canal Company, under the provisions of said Act of 1878, chap. 58, for the purposes in said Act mentioned and provided for. These bonds are now outstanding in the hands of *bona fide* holders for value. Record, p. 10.

All the observations made in reference to the priority of lien enjoyed by the bonds issued under the Act of 1844, chap. 281, are applicable to the bonds issued under the Act of 1878, chap. 58.

The mortgages, pledges and securities, to which we have referred, are in full force and validity, and have been in nowise released, paid, satisfied, or modified, except so far as the liens of the State on the revenues of the said Chesapeake and Ohio Canal Company are, or have been waived in favor of the holders of bonds issued by the said Chesapeake and Ohio Canal Company, under the said Maryland Acts of 1844, chap. 281, and 1878, chap. 58. Bill, Record, p. 10. The State of Maryland can look to no other source except the mortgages, pledges and securities made to it as aforesaid, for re-payment of the loans made by it to the said Chesapeake and Ohio Canal Company, and for the payment of the interest and moneys agreed to be to it paid under said mortgages, pledges and securities by the said Chesapeake and Ohio Canal Company. The property, revenues and tolls of the said Chesapeake and Ohio Canal Company, and its whole property, are

inadequate to the payment of said moneys, and for securing the other indebtedness, obligations and purposes, for which the same have been pledged or conveyed as aforesaid to the several mortgagees already mentioned. Bill, Record, p. 10.

The entire revenues of the Chesapeake and Ohio Canal are not adequate to put and keep the said Chesapeake and Ohio Canal and its works in good condition and repair for transportation, to provide the requisite supply of water, to pay the salaries of officers and agents and the current expenses of the said Company, and to pay the interest on the bonds issued by said Chesapeake and Ohio Canal Company under the Acts of 1878, chap. 58, and of 1844, chap. 281, which are secured by mortgages, as hereinbefore shown, or to pay any part of the interest due to the State of Maryland upon the mortgages, pledges or securities, made or given by said Chesapeake and Ohio Canal Company to the said State of Maryland, hereinbefore referred to. It is not, therefore, competent for the said Chesapeake and Ohio Canal Company, or for any of its creditors to dedicate, take, devote or apply, any part of the tolls and revenues of the said Chesapeake and Ohio Canal Company to or for any object or purpose whatsoever, other than the putting and keeping of said Chesapeake and Ohio Canal in good condition and repair for transportation, providing the requisite supply of water, and paying the salaries of officers and agents, the current expenses of said Company, and, afterwards, to the interest and principal of the bonds issued under the Maryland Act of 1878, chap. 58, and afterwards, to the interest and principal of such other bonds as may be issued hereafter under the provisions of said Maryland Acts of 1844, chap. 281, and 1878, chap. 58, and afterwards to the payment of the interest and principal of the bonds which may have been issued under the said Act of 1844, chap. 281, and afterwards to the payment of the principal and interest of the debts due as aforesaid to the State of Mary-

land, and secured by the mortgages and pledges hereinbefore referred to. Record, pp. 10, 11.

Brady vs. State, 26 Md., 306–310.

The Farmers' and Merchants' National Bank of Baltimore, the garnishee, at the time when the attachment was laid in its hands, had in its possession, on deposit, certain moneys exclusively made up of the tolls and revenues of the said Chesapeake and Ohio Canal Company which that company, had before that time, received in due course of its business. This sum was sufficient to pay the said judgment, debt, interest and costs, as well as costs of attachment, but was not sufficient to pay the other items of indebtedness of the said Company, which were prior liens on said fund; nor did it even amount to a sum sufficient to be kept reserved for the prudent management of the said canal, to meet the necessary expenses incident to the placing and keeping the said canal in proper navigable condition, after payment of the salaries of officers and supplying the necessary quantity of water for purposes of navigation. Bill, Par. 32, Record, p. 12.

It is averred in substance in the Bill of the State, par. 33, Record, p. 12, and in the Bill of the Trustees, par. 24, Record, pp. 109, 110, and is admitted by the demurrers, that the debt upon which the appellant recovered judgment and upon which he sought execution, was a debt, the securing of which was not contemplated by any of the mortgages made to the State, which are referred to in its Bill, or by the mortgage, made on June 5th, 1848, to the trustees therein named, under the provisions of the Maryland Act of 1844, chap. 281.

If the indebtedness of the Canal Company to the appellant had arisen upon any security, included within the purview, or scope, of any one of these mortgages, it would not have been in the power of the appellant, as cestui-que trust under such mortgage,

to enforce his individual claim by recovering judgment and issuing an attachment by way of execution against the particular fund to the prejudice of debts due by the Canal Company for materials or repairs, needed to keep it "a living going concern," or to the prejudice of other cestui-que trusts, having rights and equities equal to his own.

It is an elementary rule that a cestui-que trust, interested in a particular fund, can only enforce his rights against such fund to the extent of his proportionable interest therein.

When a fund is affected by a trust, in which several, or many, cestui-que trusts are interested in degrees or proportions ascertained by the instruments under which their rights originated,—and the revenues and tolls of the Chesapeake and Ohio Canal Company, deposited by it in the Farmers' and Merchants' National Bank of Baltimore, constituted such a fund,—no cestui-que trust can secure priority of payment over his co-cestui-que trusts by the appropriation of a larger part of this fund, by obtaining a judgment and issuing an attachment by way of execution thereon, than he would have been proportionably entitled to if the distribution of such fund had been made by the party charged with the administration of the trust.

If such person were a cestui-que trust, and thought that he had a right to be paid out of such fund, it was necessary, whether he was a cestui-que trust only, or a cestui-que trust who had added a judgment upon his claim to his previous security, to go into a Court of Equity, in a case in which the trustee administering the fund, and all other cestui-que trusts, interested in such fund, were parties, and to be content to receive, at the hands of such Court, *in such proceeding*, that *aliquot* proportion of such fund which was his only estate therein. Lewin on Trusts, 7 Eng. Ed., 589. 2 Perry on Trusts, 3 Ed., sec. 843.

The plaintiff being about to apply for a judgment of condemnation of so much of the said tolls, revenues and moneys of the said Company, in the hands of the garnishee, as would satisfy and pay his said judgment debt, interest and costs, and the costs of his said attachment, the State of Maryland, to prevent the award of such judgment of condemnation, and to prevent the aforesaid tolls and revenues, pledged by the said Maryland Acts of Assembly, and mortgages to the objects and purposes therein mentioned, from being applied to other and different purposes, not contemplated by the said mortgages, and wholly outside of the true intent, meaning and purview of the said Acts of Assembly, applied for the interposition of Court, in which such judgment was entered by the writ of injunction. *State vs. N. C. R. W. Co.*, 18 Md., 193. *Brady vs. State*, 26 Md., 290.

This case turns upon the true interpretation of the Maryland Act of 1844, chap. 281. That Act has been construed, as already shown, by the highest appellate tribunal in that State. The decisions thus made, ought to be followed. *Fairfield vs. County of Gallatin*, 100 U. S., 52. *Burgess vs. Seligman*, 107 U. S., 35, 34. *Taylor vs. Ypsilanti*, 105 U. S., 71. *Douglas vs. County of Pike*, 101 U. S., 686. This case does not turn, so far as the State of Maryland is concerned, upon the interpretation of the mortgage of June 5th, 1848, and, therefore, the decisions of the Court of Appeals of Maryland lose none of their authoritative force in the ancillary proceeding instituted by the State, because of any conclusion which may be deduced from *Jefferson Branch Bank vs. Skelly*, 1 Black., 443, or from *Wright vs. Nagle*, 101 U. S., 793, 794.

The group of cases of which *Fosdick vs. Schall*, 99 U. S., 249, Ibid, 256, and *Huidekoper vs. Locomotive Works*, 99 U. S., 260, form a part, need not be considered in connection with this case, except in so far as they recognize (99 U. S., 251,) that the lien of

the attachment of the Appellant, if any lien was created by his attachment, was subject to the conditions which affected the funds of the Canal Company when that attachment was laid.

The law applicable to this case must, it is respectfully submitted, be found in the decisions of the Court of Appeals of Maryland to which I have referred.

It was held by that Court, in *Brady vs. State*, 26 Md., 309, 310, that the doctrine of an implied agreement between the mortgagor and mortgagee that the mortgagor should take the rents and profits to his own use, until dispossessed by the mortgagee, had no application to the case provided for by the Maryland Act of 1844, chap. 281.

It cannot be denied that the registration of the State's mortgages and of the mortgage of June 5th, 1848, fully protected the rights of the State as mortgagee of the fixed property of the Canal Company and of its "prerogative franchises" to charge tolls, and of its personal property. Upon what theory then did these mortgages fail to protect this lien of the State upon tolls and revenues, also mortgaged, which had been received by the Canal Company, and which remained in its possession subject to the lien of the State; and upon what theory can it be alleged that the State has lost its right to insist upon the agreed application of the tolls and revenues upon which it has this lien?

CHAS. B. ROBERTS,
Attorney General of Maryland.

CHAS. J. M. GWINN,
Of Counsel for the State of Maryland, Appellee.

APPENDIX.

MARYLAND ACT OF 1878, CHAPTER 58.

AN ACT to make effectual the provisions made by the Act of December Session, eighteen hundred and forty-four, chapter two hundred and eighty-one, entitled "An Act to provide for the completion of the Chesapeake and Ohio Canal to Cumberland and for other purposes," in so far as said Act relates to putting and keeping the said Chesapeake and Ohio Canal in good condition and repair, and to make the said Canal an effective means of transportation.

Whereas, it was provided by the Act passed by the General Assembly of Maryland at its December Session, eighteen hundred and forty-four, chapter two hundred and eighty-one, that the President and Directors of the Chesapeake and Ohio Canal Company should from time to time, and at all times thereafter, have the privilege and authority to use and apply such portions of the revenues and tolls of the said Company, as in their opinion might be necessary to put and keep the said canal in good condition and repair for transportation and provide the requisite supply of water, and pay the salaries of officers and agents and the current expenses of the said Company.

And Whereas it was further provided by the said Act that the President and Directors of the said Chesapeake and Ohio Canal Company should have the authority to execute any deed, mortgage or other instrument of writing that might thereafter be deemed necessary or expedient to give the fullest effect to the powers aforesaid;

And Whereas, under the provisions of the said Act the rights and liens of this State upon the revenues of the Chesapeake and Ohio Canal Company were directed to be held and considered as waived, deferred and postponed in favor of any bonds that might be issued by the Chesapeake and Ohio Canal Company for the purpose of putting and keeping the said canal in good condition and repair for transportation, and providing the requisite supply of water and paying the expenses of the said Company, so as to make the said bonds and interest to accrue thereon preferred and absolute liens on said revenues according to the provisions of the said Act, until said bonds and interest should be fully paid;

And Whereas a sudden freshet has of late seriously injured the said Chesapeake and Ohio Canal and the works appertaining thereto, and used in connection therewith;

And Whereas the liens of this State upon the lands, tolls and revenues of the said Chesapeake and Ohio Canal Company and the liens of the bonds and coupons thereon, issued in pursuance of the Act of eighteen hundred and forty-four, chapter two hundred and eighty-one, entitled "An Act to provide for the completion of the Chesapeake and Ohio Canal to Cumberland and for other purposes," upon the net tolls and revenues of said Company are greatly impaired in value, and must further decline in such value unless the power vested in the said Chesapeake and Ohio Canal Company under the provisions of the said Act to raise money for putting and keeping its said canal in good condition and repair, and for other purposes mentioned in said Act, is made fully effectual by recognizing the priority of the bonds issued for the said purposes over all the rights and liens of the State, and over subsequent bonds issued by the said Chesapeake and Ohio Canal Company for the same purposes, if other emergencies now unforeseen of like character should ever occur, now therefore

SECTION 1. *Be it enacted by the General Assembly of Maryland,* That the Chesapeake and Ohio Canal Company be, and is hereby authorized and empowered to issue the bonds of the said Company

under its corporate seal, and signed by the President and countersigned by the Treasurer thereof, to the total amount of five hundred thousand dollars for the purpose of putting and keeping the said Chesapeake and Ohio Canal and its works in good condition and repair, for the payment of the current expenses of the said canal and for the providing of such supply of water as may be necessary to make the said canal effective as a means of transportation, and the said bonds shall be issued in sums of not less than one hundred dollars each, and each of said bonds shall be payable twenty years after date to bearer, redeemable however at the pleasure of the Company at any time after the expiration of ten years from their respective date, and shall bear interest in the meantime at the rate of six per centum per annum, in equal half-yearly instalments on the first days of January and July in each and every year according to the tenor of the coupons for said interest to be attached to the said bonds, and the said bonds shall express upon their face that the same are issued under the provisions of this Act, and without any preference of priority over each other, are preferred and are absolute liens on the revenues, tolls and property of the said Chesapeake and Ohio Canal Company, to be paid and discharged in preference to any other claims or liens upon the said Chesapeake and Ohio Canal Company or its works and property, and in preference to any bonds which may be subsequently issued by the said Chesapeake and Ohio Canal Company for the purpose of putting and keeping the said canal and its works in good condition and repair, for the payment of the current expenses of the said canal, and for the providing of such supply of water as may be necessary to make the said canal effective as a means of transportation; and the President and Directors of the said Chesapeake and Ohio Canal Company shall have power to sell and dispose of so many of said bonds as may be necessary on such terms as to them may seem proper, and to apply the proceeds thereof to the putting and keeping of the said canal and its works in good condition and repair, to the payment of the

current expenses of the said canal, and to the providing of such supply of water as may be necessary to make the said canal effective as a means of transportation, and to no other use or purpose whatsoever.

SECTION 2. *And be it enacted*, That the said Chesapeake and Ohio Canal Company be, and is hereby authorized to secure the payment of the principal and interest of the said bonds to the amount of five hundred thousand dollars, authorized to be issued by this Act as aforesaid, by the mortgage of the tolls and revenues and other property, land, water-rights and franchises of the said Chesapeake and Ohio Canal Company, which said mortgage shall be executed to George S. Brown, James Sloan, Jr., and Lloyd Lowndes, Jr., and the survivors and survivor of them as Trustees for the holders of the said bonds, with power to them, or a majority of them, or of their successors or a majority of them in case of a default in the payment of three successive coupons upon said bonds, to proceed upon the application to them in writing of the holders of a majority in amount of the bonds issued and then outstanding, secured by said mortgage, to obtain from any Court of Equity in the State of Maryland having jurisdiction by regular proceedings according to the course of Courts of Equity in this State, a decree for the sale of the said Canal and other mortgaged property and franchises, and for the appointment of a receiver, or both, as may be found necessary, to the end that the security hereby authorized for the payment of the said bonds and coupons may be full, ample and effectual; provided, however, that unless and until there shall be such default in the payment of three successive coupons outstanding at one time, or of the principal of the bonds themselves at their maturity, and unless and until the holders of a majority in amount of said bonds issued and then outstanding, shall, in writing, request proceedings for the enforcement of the said mortgage to be taken, it shall not be competent for the said trustees or their successors, or for the said bondholders themselves or any of them, to institute, or cause to be instituted, any

proceedings at law or in equity, or to proceed to sell any part of the said mortgaged property, or to apply for the appointment of a receiver, it being the intent and meaning of this Act not to make the said canal and its property, so to be mortgaged, to be liable to be sold or taken from the management of the President and Directors unless upon the failure of said Company to pay at least three successive coupons on said bonds or the said bonds themselves, and not even then unless upon the application of the holders of at least a majority in amount of said bonds issued and then outstanding; and it shall be the duty of the said trustees, upon the execution of the said mortgage, to cause the same to be forthwith recorded in the proper office for the recording of deeds of the cities and counties in the States of Maryland, West Virginia and Virginia and in the District of Columbia, in which any property of the said Chesapeake and Ohio Canal Company may be permanently located.

SECTION 3. *And be it enacted*, That the said bonds hereinbefore authorized to be issued by the Chesapeake and Ohio Canal Company, for the purposes expressed in this Act, and the mortgage which the said Chesapeake and Ohio Canal Company is by this Act authorized to make and execute for the purpose of securing the payment of the principal and interest of the said bonds, are hereby declared to be, when the same shall have been respectively made and executed, liens upon the property, tolls and revenues of the Chesapeake and Ohio Canal Company, to be held and enjoyed in preference to any rights or liens which the State of Maryland may have in or upon the said property, tolls and revenues of the said Chesapeake and Ohio Canal Company, until the said bonds, provided to be issued under this Act, and coupons thereon according to the legal obligation thereof against said Company are wholly paid and satisfied, and also in preference to any other claims or liens upon the said Chesapeake and Ohio Canal Company, or its works or property, and in preference to any bonds which may be subsequently issued by the said Chesapeake and Ohio Canal Com-